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In the
United States Court of Appeals
For the Seventh Circuit

No. 11839

FEDERAL TRADE COMMISSION,
Petitioner-Appellee,

vs.

WILLIAM T. REED, President
[redacted]EED CANDY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable
Julius J. Hoffman,
Trial Judge.

BRIEF AND APPENDIX TO APPELLANT'S BRIEF

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11839

FEDERAL TRADE COMMISSION, Petitioner-Appellee, vs. WILLIAM T. REED, President Reed Candy Company, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Honorable Julius J. Hoffman, Trial Judge.

BRIEF AND APPENDIX TO APPELLANT'S BRIEF.

STATEMENT OF FACTS.

The Federal Trade Commission, hereinafter called "Petitioner", issued a complaint against the Reed Candy Company, hereinafter called "Respondent", alleging Petitioner had reason to believe Respondent violated the provisions of sub-section (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act.

The complaint was referred to a Hearing Examiner.

The Petitioner caused the Hearing Examiner to issue a subpoena *duces tecum* directed to William T. Reed, President of Respondent Company, to appear, testify and produce accounts, records, books and other documents. Said subpoena was issued under the purported authority

of Section 9 of the Federal Trade Commission Act (38 Stat. 722; 15 U.S.C.A. Sec. 49).

Respondent moved the Hearing Examiner to quash the subpoena on the ground that in a Clayton Act proceeding, Section 9 of the Federal Trade Commission Act is inapplicable. The Motion was denied. Respondent appealed to Petition to overrule the action of the Hearing Examiner. Petitioner affirmed the ruling of the Hearing Examiner.

Another subpoena was served substantially in the same form as the subpoena first issued except as to date William T. Reed (hereinafter referred to as Defendant) refused to appear and comply therewith on advice of his counsel for the reason that Petitioner had no subpoena power in a proceeding under the Clayton Act, as amended by the Robinson-Patman Act, and that Section 9 of the Federal Trade Commission Act does not apply to Clayton Act proceedings.

On May 7, 1956, the Petitioner filed an application in the United States District Court for the Northern District of Illinois, Eastern Division, alleging it had authority conferred upon it by Section 9 of the Federal Trade Commission Act, to apply for an Order in the District Court requiring the Defendant to appear before the Petitioner, or a Hearing Examiner, and produce documentary evidence and answer all questions pertinent, relevant and material, necessary and proper in the conduct of the proceedings entitled "In the Matter of Reed Candy Company—Federal Trade Commission—Docket No. 6461". (Appx. 3)

Defendant answered the application and stated: (Appx. 8)

1. Denied Petitioner had authority under Section 9 of the Federal Trade Commission Act to issue the subpoena against Defendant, in that, the proceeding against the Respondent was not under the Federal Trade Commission Act, but was under the Clayton Act, as amended by the Robinson-Patman Act; (Appx. 8)

2. That Respondent did not violate sub-section (d) of Section 2 of the Clayton Act (49 Stat. 1526; 15 U.S.C.A., Sec. 13), as amended by the Robinson-Patman Act; (Appx. 8)

3. That the Federal Trade Commission had no right, power or authority to issue the subpoena in this case (brought under the Clayton Act, as amended) under consideration and hearing. (Appx. 8)

4. Affirmatively, the Defendant stated that the Petitioner is seeking to use a remedy under the Federal Trade Commission Act when no proceedings are pending thereunder, and the action of the Petitioner is void, illegal, self-discrimination and determination; (Appx. 9)

5. Defendant stated further the application seeks records of the Respondent Corporation, which is not a party to this application, and the said application is fatally defective for that reason. (Appx. 9)

6. Defendant stated that there is no charge in the complaint filed before the Petitioner, or the application for the subpoena *duces tecum* filed before the District Court that Respondent had violated or is violating the provisions of the Federal Trade Commission Act. In the proceeding against Respondent, Petitioner only has power under and by virtue of the Clayton Act, as amended by the Robinson-Patman Act, and said Act does not grant Petitioner power to issue the subpoena *duces tecum* as

prayed for in the said application. The subpoena, on its face, shows that it is not issued under and by authority of any right given the Petitioner by the Clayton Act, as amended, but is issued solely and by virtue of alleged power and authority granted to the Petitioner by the Federal Trade Commission Act, which Act is separate and distinct, and is not part of the Clayton Act, as amended. (Appx. 10)

On June 12, 1956, the District Court entered the following Order:

> "Pursuant to the authority granted in Section 9 of the Federal Trade Commission Act (38 Stat. 722; 15 U.S.C.A. Sec. 49), the Federal Trade Commission having invoked the aid of this Court in requiring the production of documentary evidence and the giving of testimony by William T. Reed, President, Reed Candy Company, as a witness in a proceeding instituted by the Federal Trade Commission against Reed Candy Company, Federal Trade Commission Docket No. 6461,
>
> and the Court having considered the application of the petitioner, it is hereby
>
> ORDERED: That the application of petitioner is granted, and that the said William T. Reed, President, Reed Candy Company, is hereby ordered to appear upon not less than ten days' notice at a time and place to be set by the Federal Trade Commission or a hearing examiner thereof within the jurisdiction of this Court, and to then and there produce all the documentary evidence identified and described in a subpoena issued by the hearing examiner of the Federal Trade Commission on April 2, 1956, and already served upon said William T. Reed, President, Reed Candy Company, and then and there to answer all questions relevant and material to and necessary and proper to the conduct of the aforementioned proceeding." (Appx. 13)

Defendant filed a Notice of Appeal from said Order. (Appx. 14)

The errors relied on:

1. The District Court erred in sustaining the authority to issue the subpoena under Section 9 of the Federal Trade Commission Act (38 Stat. 722; 15 U.S.C.A., Sec. 49) because the proceeding was brought under the Clayton Act, as amended by the Robinson-Patman Act, and not under the Federal Trade Commission Act. The Clayton Act contains no subpoena power.

2. The Clayton Act, as amended by the Robinson-Patman Act, is self-contained. No authority is granted therein for the issuance of a subpoena. The District Court erred in holding that Section 9 of the Federal Trade Commission Act grants Petitioner subpoena power in a proceeding brought solely under the Clayton Act, as amended.

3. Administrative expediency is not a basis for attempting to assert subpoena powers which Congress never gave under the Clayton Act, as amended.

4. A Statute lacking power cannot be augmented or supplied by judicial legislation.

CONTESTED ISSUES.

I.

Does the Federal Trade Commission have subpoena powers in a proceeding under the Clayton Act, as amended by the Robinson-Patman Act?

II.

Will the Courts supply the omission of subpoena powers in a Congressional enactment, whether the omission is by inadvertence or design?

III.

Will the Courts take subpoena powers granted to the Federal Trade Commission in proceedings brought under the Federal Trade Commission Act, and permit the use of those powers in proceedings brought under the Clayton Act, as amended, although no such power is given under said Act?

IV.

Will the Courts sanction administrative expediency as a basis for asserting subpoena powers which Congress never gave to the Petitioner under the Clayton Act, as amended?

PROPOSITIONS OF LAW.

I.

The Court erred in holding the Federal Trade Commission has subpoena powers in a proceeding under the Clayton Act, as amended by the Robinson-Patman Act.

Federal Trade Commission Act, Section 9, 38 Stat. 722, 15 U.S.C.A. 49.

Clayton Act, 38 Stat. 734, 15 U.S.C.A. 21.

The Final Report of the Attorney General's Committee on Administrative Procedure (1941), Page 422.

Harriman v. Interstate Commerce Commission, 211 U.S. 407.

Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission, 291 U.S. 587.

Federal Trade Commission v. Eastman Kodak Co., 274 U.S. 619.

Webb-Pomerene Export Trade Act of 1918, Sec. 5, 40 Stat. 517; 15 U.S.C.A., Sec. 65.

Wool Products Labeling Act of 1939, Sec. 6 (a), 54 Stat. 1131; 15 U.S.C.A., Sec. 68 d(a).

Fur Products Labeling Act, Sec. 5(a) (2), 65 Stat. 179; 15 U.S.C.A., Sec. 69 f (a)(2).

Flammable Fabrics Act, Sec. 5(b) 67 Stat. 112; 15 U.S.C.A., Sec. 1194 (b).

II.

The Courts will not supply a Congressional omission of subpoena, whether the omission is by inadvertence or design.

U. S. v. Monia, 317 U.S. 424.

Ebert v. Poston, 266 U.S. 548.

Corona Coal Co. v. U. S., 263 U.S. 537.

Hobbs v. *McLean*, 117 U.S. 567.

U. S. v. *Weitzel*, 246 U.S. 533.

Pope v. *Chicago Title & Trust Co.*, 182 U.S. 438.

U. S. v. *Union Pac. R. R. Co.*, 91 U.S. 72.

Webb-Pomerene Export Trade Act of 1918, Sec. 5, 40 Stat. 517; 15 U.S.C.A. Sec. 65.

Wool Products Labeling Act of 1939, Sec. 6(a), 54 Stat. 1131; 15 U.S.C.A. Sec. 68 d(a).

Fur Products Labeling Act, Sec. 5 (a)(2), 65 Stat. 179; 15 U.S.C.A. Sec 69 f (a)(2).

Flammable Fabrics Act, Sec. 5(b) 67 Stat. 112; 15 U.S.C.A., Sec. 1194 (b).

III.

The Court will not take subpoena powers granted to the Federal Trade Commission in proceedings brought under the Federal Trade Commission Act and permit these subpoena powers to be used in a proceeding brought under the Clayton Act as amended by the Robinson-Patman Act.

Times-Picayune v. *U. S.*, 348, U.S. 594.

Federal Trade Commission v. *Ruberoid*, 343 U.S. 470.

IV.

The Courts will not sanction administrative expediency as a basis for asserting subpoena powers which Congress never gave Petitioner under the Clayton Act, as amended by the Robinson-Patman Act.

Federal Trade Commission v. Wm. B. Rubin, etc., et al., Opinion No. 381, U.S. Dist. Ct., So. Dist. N.Y. (1956) Appendix A.

Federal Trade Commission v. Ruberoid Co., 343 U.S. 470.

Federal Trade Commission v. Raladam Co., 283 U.S. 643.

Falcone v. *Barnes*, 350 U.S. 179.

ARGUMENT.

I.

The Court erred in holding the Federal Trade Commission has subpoena powers in a proceeding under the Clayton Act, as amended by the Robinson-Patman Act.

The complaint filed by the Petitioner charged the Respondent, Reed Candy Company, a corporation, with a violation of the provisions of sub-section (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. No where in the complaint is there any allegation or charge that the Respondent violated any part of the Federal Trade Commission Act, or any other Act (except the Clayton Act, as amended) administered or enforced by the Federal Trade Commission.

At the outset, we must assume that the Petitioner takes the position that it has authority to issue the subpoena *duces tecum* directed to the Defendant, and its power stems from Section 9 of the Federal Trade Commission Act. The subpoena was issued by the Hearing Examiner, on the alleged authority of Section 9 of the Federal Trade Commission Act. Petitioner took the same position as the Hearing Examiner when it sustained his order.

Petitioner filed an application in the District Court requesting the entry of an order on defendant requiring production of documentary evidence and the giving of testimony. The Petitioner specifically stated that it applied to the District Court pursuant to the authority conferred upon it by the provisions of Section 9 of the Federal Trade Commission Act. The District Court granted the application of the Petitioner and based the authority for the entry of the order specifically on Section 9 of the Federal Trade Commission Act.

The subpoena powers under the Federal Trade Commission Act, in clear and unambiguous langauge, states the power is limited solely to Federal Trade Commission Act proceedings, and nowhere is there a scintilla of reference to any other Act administered by the Federal Trade Commission. Section 9 of the Federal Trade Commission Act (38 Stat. 722) states this limitation at its very beginning:

> "*That for the purposes of this Act* the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." * * * (Emphasis added)

This original limitation is definite and certain in the codification of Section 9 in the United States Code Annotated as Section 49 of Title 15:

> "For the purpose of section 41-46 and 47-58 of this Title the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoona the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." * * *

There can be no question that Section 49 specifically limits the grant of the subpoena power to the Commission for the purposes of Section 41-46 and 47-58 of this Title, and not for the Clayton Act, as amended, or for any Act administered or enforced by the Federal Trade Commission.

The authority of the Federal Trade Commission to investigate and enforce compliance with Sections 2, 3, 7 and 8 of the Clayton Act is derived from Section 11 of the Clayton Act (38 Stat. 734; 15 U.S.C.A. Sec. 21):

> "Authority to enforce compliance with Sections 13, 14, 18 and 19 of this title by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communications or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:
>
> "Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of Sections 13, 14, 18 and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or

in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a United States Court of Appeals, as hereinafter provided, the Commission or Board may at any time, upon such notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section."

* * *

"Complaints, orders, and other processes of the Commission or Board under this section may be served by anyone duly authorized by the Commission or Board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of service of the same. * * *"

The Clayton Act, as amended by the Robinson-Patman Act, is self-contained. The procedural steps are outlined with great particularity and leave nothing to conjecture. It details the procedure to be followed by administrative agencies in the exercise of the enforcement provisions of the Act; how to proceed; how to issue orders and how to take each and every step. No word appears in the said Act giving authority to the Federal Trade Commission or any other agency to issue a subpoena. As a matter of fact, it makes little difference who enforces the Clayton Act, whether it be the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Federal Reserve Board, or the Federal Trade Commission. Each one of these administrative agencies is governed by the Clayton Act when it exercises the powers given under said Act. It would be facetious to argue that the Federal Trade Commission is singled out over the other enforcement agencies and is given special privileges in that it "must have" subpoena powers given to it to expedite its investigation and processing of Clayton Act cases. Section 11 of the Clayton Act, or any other section or any of its amendments does not have a single expression which gives the Commission the right and authority to issue and enforce a subpoena or subpoena *duces tecum*.

It must be noted that under Section 13 and 15 of the Clayton Act (38 Stat. 736; 15 U.S.C.A., Sec. 23-25) the use of subpoenas is expressly considered in *Court* proceedings.

Let us consider the last paragraph of Section 11 where Congress enacted the method of service:

> "Complaints, orders and other processes of the commission, authority, or board under this section may be served by anyone duly authorized by the commission, authority, or board either (a) by delivering

a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same."

There is no reference whatsoever in that paragraph which is susceptible to any other meaning that what it says and it is merely a description of the mechanics to be used in the service of papers authorized by the preceding paragraph of Section 11. The Section contains no grant of power to the administrative agencies to issue subpoenas thereunder. The Petitioner may argue, that the words "and other processes" in Section 11 of the Clayton Act, would give subpoena powers to the Federal Trade Commission. This argument lacks merit when consideration is given to virtually the identical language which is contained in Section 5 (f) of the Federal Trade Commission Act. Section 5 (f) referring to "other processes" is not a grant of subpoena power to the Federal Trade Commission any more than the last paragraph of Section 11 referring to "other processes" is. The subpoena power under the Federal Trade Commission Act is given *specifically* by Congress in Section 9 thereof. The Final Report of the Attorney General's Committee on Administrative Procedure (1941), at Page 422 thereof specifically concurs in our view and comments on the lack of any subpoena power in the Federal Reserve Board. The

Federal Reserve Board is one of the five administrative agencies that enforce the Clayton Act. To acquiesce in the Commission's contention that the subpoena power in Section 9 of the Federal Trade Commission Act also inures to Clayton Act proceedings would violate the express language of the very section granting the power. It means that the District Court said, that when Congress used the language "for the purposes of this Act" (The Federal Trade Commission Act) Congress meant "for the purposes of this Act" (Federal Trade Commission Act) and for the purpose of the Clayton Act as amended by the Robinson-Patman Act. Again, we must remember when Congress codified Section 9 into the United States Code it expressly limited subpoena powers "for the purposes of Sections 41-46 and 47-58 of this Title". The District Court would have us believe that Congress was mistaken and meant to say "for the purposes of Sections 41-46 and 47-58, and Sections 13, 14, 18 and 19 of this Title". This, of course, was never the intention of Congress nor is it the law. In *Harriman v. Interstate Commerce Commission*, 211 U.S. 407, 419 (1908) the Court stated:

> "No court has ever held that any agency with a subpoena power limited to 'for the purposes of this Act' may use the subpoena power to compel the attendance and testimony of witnesses in a hearing pursuant to another Act of Congress the provisions of which do not authorize the use of the subpoena power."

Subsequent to the enactment of Section 9, Congress enacted much trade legislation. It recognized therein the subpoena power and other powers of Section 9 were confined solely to the enforcement of the Federal Trade Commission Act, and was not a grant to the Federal

Trade Commission for all purposes. It appears that if, in fact, Section 9 of the Federal Trade Commission Act embodied a grant of subpoena powers to it in all its activities irrespective of the express limitation imposed at the very beginning of the Section, Congress would not and need not have made specific provisions for the grant of subpoena powers when conferring additional enforcement responsibilities upon the Commission. Congress has consistently followed such practice, and in each Act, gave all the power it intended to give under said Act.

In Section 5 of the *Webb-Pomerene Export Trade Act* of 1918 (40 Stat. 517, 15 U.S.C.A. Section 65) Congress said:

> "For the purpose of enforcing these provisions the Federal Trade Commission shall have all the powers, so far as applicable, given it in the Federal Trade Commission Act."

So, too Section 6 (a) of the *Wool Products Labeling Act* of 1939, 54 Stat. 1131, 15 U.S.C.A. Section 68 d(a), said explicitly:

> "(a) * * * this Act shall be enforced by the Federal Trade Commission under rules, regulations, and procedure provided for in the Federal Trade Commission Act.
>
> The Commission is authorized and directed to prevent any person from violating the provisions of Sections 68-68j of this title in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of sections 68-68j of this title. * * *"

The same incorporation of powers is made in Section 5(a) (2) of the *Fur Products Labeling Act*, 65 Stat. 179, 15 U.S.C.A. Sec. 69 f (a)(2).

> (2) The Commission is authorized and directed to prevent any person from violating the provisions of sections 69a, 69d, and 69h (b) of this title in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this Act; * * *"

and in Section 5(b) of the *Flammable Fabrics Act*, 67 Stat. 112, 15 U.S.C.A. Sec 1194 (b):

> "(b) The Commission is authorized and directed to prevent any person from violating the provisions of section 1192 of this title in the same manner, by the same means and with the same jurisdiction, powers and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this chapter; * * *"

The Federal Trade Commission, like any other Administrative Agency, has only such power as are conferred upon it by the Statute which creates it.

> *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission*, 291 U.S. 587, 598 (1934).

It is basic law that the Federal Trade Commission exercises only the administrative functions authorized and delegated to it by Congress, and not judicial powers.

> *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U.S. 619, 623 (1927).

II.

The Courts will not supply the omission of subpoena powers in a Congressional enactment, whether the omission is by inadvertence or design.

The Courts will not and cannot legislate by judicial decision. Where a statute is susceptible to only one meaning, no words or phrases may be inserted or a *casus omissus* supplied to change the intention of Congress. The same rule is applicable to an intentional omission of certain powers that might be desirable but not given.

It is immaterial whether the omission was a mere oversight on the part of the Congress, even though there is no doubt that had it been called to the attention of Congress the oversight would have been corrected. To permit the Courts to legislate would be a usurption of legislative powers, and an entry by it into the legislative field.

It is clear that statutes relating to similar subject matters may not be resorted to, to determine the intent of the Congress in connection with a particular statute if the statute is clear and unambiguous. In the case at bar the statute is clear and unambiguous and not subject to interpretation.

In *Corona Coal Co.* v. *U. S.*, 263 U.S. 537, page 540, the Court said:

> "but the words of the statute are plain, without nothing in the context to make their meaning doubtful; no room is left for construction and we are not at liberty to add an exception in order to remove apparent hardship."

The highest Court of the land has consistently held to the foregoing views in all of its pronouncements.

In *U. S.* v. *Union Pac. R.R. Co.*, 91 U.S. 72, the Court said at page 85:

"Courts cannot supply omissions in legislation, nor afford relief because they are supposed to exist. * * * 'We are bound' said Justice Buller, in an early case in the King's Bench, 'to take the act of Parliament as they have made it; a *casus omissus* can, in no case, be supplied by a court of law, for that would be to make laws; * * *'."

In *Pirie* v. *Chicago Title & Trust Co.*, 182 U.S. 438, the Court said at page 448:

"* * * an omission of the words implies an omission of purpose."

In *Ebert* v. *Poston*, 266 U.S. 548, the Court said at page 553-4:

"The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed. A *casus omissus* does not justify judicial legislation."

In *U. S.* v. *Weitzel*, 246 U.S. 533, the Court stated:

"a *casus omissus* is not unusual, particularly in legislation introducing a new system."

In *Hobbs* v. *McLean*, 117 U.S. 567, at page 579, the Court held:

"When a provision is left out of a statute, either by design or mistake of the legislature, the Courts have no power to supply it. To do this would be to legislate and not to construe."

In *U. S.* v. *Monia*, 317 U.S. 424, the Court was asked to pass upon a question of *casus omissus* in many respects similar to the case at bar. A trade law was involved therein. The defendant was subpoenaed to appear before a grand jury that was investigating an alleged viola-

tion of the Sherman Act. Defendant appeared and gave testimony without specifically claiming the privilege of self-incrimination. Subsequently the defendant was indicted for violation of the Sherman Act. The question arose as to whether or not the defendant was immune from prosecution. The Sherman Act (32 Stat. at large 854, 904, Ch. 755, 15 U.S.C.A., Paragraph 32) provides:

> "* * * no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts (The Inter-State Commerce Act, the Sherman Anti-trust Act, and other acts); Provided, further, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

The Court said at page 426:

> "Beyond dispute the appellees were entitled to immunity from prosecution if the statute is to be given effect as it is written. We are asked, however, to read into it a qualification to the effect that immunity is not obtained unless the privilege against self-incrimination is claimed."

The Government contended that the defendant was not immune from prosecution because he did not claim the privilege against self-incrimination. The Government further contended that the Sherman Act had had to be read in *pari materia* with the Fifth Amendment.

The Court noted that in subsequent Congressional Acts, Congress specifically provided that a witness must claim the privilege of self-incrimination before a witness is immune from prosecution.

The Court held at page 429-30:

> *"These acts indicate how simple it would have been to add a similar provision applicable to the Interstate Commerce Act, the Sherman Act, and others which have been allowed to stand as originally enacted save for the amending Act of 1906.*
>
> "The legislation involved in the instant case is plain in its terms and, on its face, means to the layman that if he is subpoenaed, and sworn, and testifies, he is to have immunity. Instead of being a trap for the Government, as was the original Act, the statutes in question, if interpreted as the Government now desires, may well be a trap for the witness. Congress evidently intended to afford Government officials the choice of subpoenaing a witness and putting him under oath, with the knowledge that he would have complete immunity from prosecution respecting any matter substantially connected with the transactions in respect of which he testified, or retaining the right to prosecute by forgoing the opportunity to examine him. That Congress did not intend, or by the statutes in issue provide, that, in addition, the witness must claim his privilege, seems clear. It is not for us to add to the legislation what Congress pretermitted." (Emphasis added)

The Court cannot supply the omission of subpoena powers in Section 11 of the Clayton Act, as amended by the Robinson-Patman Act whether the omission was by inadvertence or design of the Congress.

The analogy to the case at bar is simple. Congress has consistently followed the practise of making specific provisions for the grant of subpoena powers when conferring additional responsibilities upon the Federal Trade Commission. For instance, in the *Webb-Pomerene Export Trade Act* of 1918, (40 Stat. 517, 15 U.S.C.A., Sec. 65); *Wool Products Labeling Act* of 1939 (54 Stat. 1131, 15

U.S.C.A., Sec. 68 d(a); the *Fur Products Labeling Act* (65 Stat. 179, 15 U.S.C.A., Sec. 69 f (a)(2); and *Flammable Fabrics Act* (67 Stat. 112, 15 U.S.C.A., Sec. 1194 (b), Congress specifically provided that under each Act the same jurisdiction, powers and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of each of the specific acts. *In the Clayton Act no such provision was made.*

III.

The Court will not take subpoena powers granted to the Federal Trade Commission in proceedings brought under the Federal Trade Commission Act and permit these subpoena powers to be used in a proceeding brought under the Clayton Act as amended by the Robinson-Patman Act.

The Clayton Act was not amendatory of the Federal Trade Commission Act. The Clayton Act is a Congressional enactment with independent status.

> *Federal Trade Commission* v. *Ruberoid*, 343 U.S. 470.

In the case at bar the petitioner elected to proceed under the Clayton Act, as amended by the Robinson-Patman Act. Petitioner did not proceed under the Federal Trade Commission Act. It must prove its case under the terms and by the mechanics set forth in the Clayton Act, as amended by the Robinson-Patman Act. In *Times-Picayune* v. *U.S.*, 348 U.S. 594, the Court said, at page 609-10:

> "The Government at the outset elected not to proceed under the Clayton Act, but under the Sherman Act * * * *the Government must measure up to the criteria of the more stringent law.*" (Emphasis added)

IV.

The Courts will not sanction administrative expediency as a basis for asserting subpoena powers which Congress never gave Petitioner under the Clayton Act, as amended by the Robinson-Patman Act.

The Federal Trade Commission is attempting to assert, under the guise of administrative expediency, a subpoena power which Congress never gave it in the enforcement of the Clayton Act, as amended by the Robinson-Patman Act.

The Supreme Court in *Falcone* v. *Baynes*, 350 U.S. 179, recently sustained the judgment of Judge Foley in the United States District Court for the Southern District of New York in a similar situation. In that case another administrative agency attempted to use subpoena power not expressly granted to it by Congress. Judge Foley refused to sanction the attempt to over-reach the authority granted by Congress. He held, subpoena powers could not be conferred except by express and explicit terms in the Act.

The question as to whether the Petitioner will be handicapped in the effective enforcement of the Clayton Act because Congress did not see fit to grant it subpoena powers in a Clayton Act as amended by the Robinson-Patman Act, cannot be considered by the Courts. The proper forum for Petitioner's relief is not in the Courts but in Congress.

In *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, the Court said:

> "Officially powers cannot be extended beyond the terms and necessary implications of the Congress. If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the Courts in the proper exercise of their judicial sanctions."

In *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, at page 478, the Court said:

> "We cannot subscribe to this argument, which disregards the unequivocal language of the statute and its consistent interpretation over the 38 year period of its existence. Congress, in 1938, amended similar language in the Federal Trade Commission Act, so that the reviewing Court is now plainly required, upon affirmance, to enforce an order based upon violation of that Act. The Commission has repeatedly sought similar amendment of the Clayton Act provisions involved in this case. We will not now achieve the same result by reinterpretation in the face of Congress' failure to pass the bills thus brought before it. *Effective enforcement of the Clayton Act by the Commission may be handicapped by the present provisions, but that is a question of policy for Congress.*" (Emphasis added).

In a recent opinion by District Judge E. J. Dimock, sitting in the United States District Court for the South-ern District of New York, Opinion No. 381, in "*Federal Trade Commission, Petitioner, v. William B. Rubin, President; The Sweets Company of America, Inc.* and *The Sweets Company of America, Inc., a corporation, Respondents*", No. 18-304, the Court had before it the exact question as the District Court in the case at bar. The Court in that case denied the application for the enforcement of the subpoena. In the case at bar and in the other case cited by Judge Dimock in the Maryland District Court, no opinion was written. We take the liberty of printing the opinion of Judge Dimock as Appendix A to this brief for the Court's convenience inasmuch as the same has not been published to date.

CONCLUSION.

We respectfully submit that we have clearly shown that the Federal Trade Commission was without power or authority, express or implied, to issue the subpoena in question under Section 9 of the Federal Trade Commission Act in a Clayton Act proceedings, as amended by the Robinson-Patman Act; that the District Court erred in entering an order on the defendant compelling him to respond to the said subpoena, and that the said order is contrary to the decisions of the Courts.

It is respectfully urged that the order entered by the United States District Court for the Northern District of Illinois, Eastern Division, on June 12, 1956 be reversed and an order entered by this Court denying the relief sought by the Petitioner.

Respectfully submitted,

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Chicago, Illinois
Attorney for Appellant

LEONARD A. CANEL,
JAY A. CANEL,
Of Counsel.

APPENDIX A.

#381

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
FEDERAL TRADE COMMISSION

Petitioner

against M 18-304

WILLIAM B. RUBIN, President, The Sweets Company of America, Inc. and THE SWEETS COMPANY OF AMERICA, INC., a corporation

Respondents

Appearances:

Honorable Paul W. Williams, United States Attorney for the Southern District of New York, Attorney for Petitioner, Thomas B. Gilchrist, Esq., Chief Assistant United States Attorney, Andrew C. Goodhope, Esq., Attorney for Federal Trade Commission Washington, D. C., Of Counsel.

Becker, Ross & Stone, Esqs., Attorneys for Respondents, 41 East 42nd Street, New York 18, N.Y., Albert A. DeStefano, Esq., Jerome Thomases, Esq., Jesse Margolin, Esq., Of Counsel.

OPINION.

DIMOCK, *D. J.*

This is an application made by the Federal Trade Commission for the enforcement of a subpoena issued by that Commission in a proceeding instituted by it for the enforcement of the provisions of section 2(d) of the Clayton Act, 15 U.S.C. Sec. 13, 49 Stat. 1526. It is said to be made pursuant to section 9 of the Federal Trade Commission Act, 15 U.S.C. 49. The application is resisted on

the ground that the Federal Trade Commission has no power to issue a subpoena in a proceeding before it for the enforcement of the Clayton Act.

The Clayton Act prescribes a single self-contained procedure for the enforcement of its provisions, whether by the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Federal Reserve Board or the Federal Trade Commission. Respondent asserts that the Clayton Act says not a word about the exercise of the subpoena power by any of them. Petitioner denies this but argues that if there is any deficiency it is supplied in the case of proceedings before the Federal Trade Commission by section 9 of the Federal Trade Commission Act, 15 U.S.C. Sec. 49, which provides that "for the purposes of this Act the commission * * * shall at all reasonable times have access to * * * any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena * * * the production of all such documentary evidence relating to any matter under investigation."

The decision of these questions requires a study of the statutes involved. I will consider them as they stood at the time of their adoption since the later amendments have no bearing on the questions here presented.

The Federal Trade Commission Act was adopted on September 26, 1914, 38 Stat. 717, now 15 U.S.C. 41-77. Section 5 of the Act, now 15 U.S.C. Sec. 45, declared unlawful unfair methods of competition.

In the third paragraph of that section, which is quoted in the margin[1], provision was made for the institution of proceedings by and before the Federal Trade Commission against persons charged with unfair methods of competition. Detailed provisions for the conduct of such proceedings were given, including a complaint, hearing, findings, report and order to cease and desist. Until a transcript had been filed in a circuit court of appeals, the commission might "upon such notice * * * as it shall deem proper, modify or set aside" any report or order.

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[1] "Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section."

The eighth paragraph of the same section 5, which is quoted in part in the margin[1], prescribed the manner of service of "(c)omplaints, orders and other processes of the commission under this section" and the persons upon whom they might be served.

Section 9 of the Act, 15 U.S.C. 49, in its first paragraph which is quoted below[2], provided for the subpoena power, saying "for the purposes of this Act the commission, * * * shall at all reasonable times have access to * * * any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation."

Thus it was prescribed, by section 5, that the Federal Trade Commission could initiate and prosecute complaints

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[1] "Complaints, orders, and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business."

[2] "Sec. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence."

and that "complaints, orders and other processes of the commission under this section" should be served in a certain manner, and, by section 9, that the commission should have the subpoena power.

A few days later, on October 14, 1914, the Clayton Act, 38 Stat. 730, now 15 U.S.C. Secs. 12-27, 44, 29 U.S.C. Sec. 52, was adopted.

It was declared unlawful, in sections 2, 3, 7 and 8, 15 U.S.C. 13, 14, 18 and 19, discrimination, transactions binding the purchaser not to use goods of a competitor, acquisition of stock to lessen competition and interlocking directorates. Section 11, now 15 U.S.C. Sec. 21, vested authority to enforce compliance with sections 2, 3, 7 and 8 in the Interstate Commerce Commission, in the Federal Reserve Board and in the Federal Trade Commission, depending upon whether a common carrier, a bank or some other type of corporation was concerned.

Then came the second paragraph of section 11, quoted in the margin[4], which, in almost exactly the same language as used in the part of the earlier Federal Trade Com-

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[4] "Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the

mission Act quoted in footnote 1, supra, made provision for the institution of proceedings by and before the appropriate board or commission against persons charged with violation of sections 2, 3, 7 or 8 of the Clayton Act. Just as in the Federal Trade Commission Act, detailed provisions for the conduct of such proceedings were given, including a complaint, hearing, findings, report and order to cease and desist, and again it was provided that, until a transcript had been filed in a circuit court of appeals, the board or commission might "upon such notice * * * as it shall deem proper, modify, or set aside" any report or order.

The seventh paragraph of this section, 11, of the Clayton Act, which is quoted in part in the margin*, in practically

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* (Continued)

provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any other made or issued by it under this section."

"Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business."

identical language with that used in the earlier Federal Trade Commission Act quoted in footnote 2, supra, prescribed the manner of service of "(c) complaints, orders, and other processes of the commission or board under this section" and the persons upon whom they might be served.

In spite, however, of the substantial identity of the Clayton Act with the Federal Trade Commission Act insofar as concerned procedure and service of complaints, orders and processes, the Clayton Act omitted the provision contained in section 9 of the Federal Trade Commission Act granting the power to issue subpoenas.

Petitioner says that, despite this omission, the Federal Trade Commission has the subpoena power in proceedings for the enforcement of the Clayton Act. This contention might be supported by demonstration either that the Clayton Act conferred the subpoena power on the commissions and board which were authorized to enforce it, or that the Federal Trade Commission could use its special subpoena power in enforcement of the Clayton Act.

First, I shall take up the proposition that all three of the enforcing bodies have the subpoena power by virtue of the Clayton Act. The only argument for that that I can conceive of is that the word "processes", used in the section on service, implies a grant of the subpoena power in Clayton Act proceedings.

It will be noted that both section 5 of the Federal Trade Commission Act and section 11 of the Clayton Act refer to the service of "(c) complaints, orders, and other processes * * * under this section". In each statute "this section" refers to a section prescribing the procedure for the institution and prosecution of complaints. Neither section refers to the subpoena power and, indeed, the subpoena

power is not conferred or referred to at all by the Federal Trade Commission Act until the later section 9. In each statute "this section" dealt with a notice in addition to a complaint and order. The provision for service might well have described the papers as "complaints, orders or notices * * * under this section" but the more generic term "processes" was used out of an abundance of caution. Since the section had nothing to do with subpoenas and the word "processes" serves a function without treating it as referring to subpoenas, I cannot bring myself to say that they are included in the expression "processes * * * under this section". I hold, therefore, that the Clayton Act did not confer the subpoena power on the commissions and board which it authorized to enforce the Act.

I reach this conclusion with great reluctance. I cannot help feeling that the omission of the subpoena power section from the Clayton Act was a mere inadvertance and, were I able to find any internal evidence to support that feeling, I would treat that evidence as an implication of the power. A decent respect for the separation of the spheres of the judiciary and the legislative prohibits me, however, from presuming that something that I would have included in a statute was inadvertently omitted by Congress and then supplying the omitted matter.

I now pass to what I understand to be the contention of petitioner, that the subpoena power conferred upon the Federal Trade Commission by the Federal Trade Commission Act may be used by it in the enforcement of the Clayton Act.

I do not approach it with the same predisposition in its favor that characterized my consideration of the first point. For the purposes of this point I assume that I was correct in deciding that none of the enforcing bodies were

given any subpoena power under the Clayton Act. It is hard to conceive of a congressional policy which would withhold the subpoena power from the Federal Reserve Board where the Act was being enforced against banks, but bestow it upon the Federal Trade Commission where the Act was being enforced against other non-carrier corporations. Yet that would be the result of holding that the subpoena power in Clayton Act cases was conferred on the Federal Trade Commission by the Federal Trade Commission Act. No statute has ever conferred the subpoena power on the Federal Reserve Board. Thus the Federal Trade Commission could use subpoenas in Clayton Act cases but the Federal Reserve Board could not.

In arguing that the Federal Trade Commission's subpoena power granted by the Federal Trade Commission Act may be used by it in the enforcement of the Clayton Act, petitioner uses as a makeweight the word "processes" which I have just discussed. It is claimed that this word includes "subpoenas" and thus indicates that Congress contemplated that the commissions and board which would enforce the Clayton Act would use in doing so such subpoena power as was granted them by other acts. As just indicated, I cannot bring myself to believe that the word "processes" as used in the Clayton Act includes subpoenas so I cannot allow it influence, even as a makeweight, in supporting petitioner's contention that the Federal Trade Commission Act empowers the Federal Trade Commission to use subpoenas in the enforcement of the Clayton Act.

Petitioner's proposition is that the words "for the purposes of this Act" in the opening line of section 9 of the Federal Trade Commission Act which reads "for the purposes of this act the commission * * * shall * * * have

access to * * * documentary evidence" should be construed to mean "for the purposes which this act is intended to accomplish". It is said that it has been held that everything made illegal by the Clayton Act was illegal under the Federal Trade Commission Act so that any proceeding to enforce the Clayton Act must be for the same purpose as the Federal Trade Commission Act and therefore the Federal Trade Commission has the subpoena power therein.

The words "for the purposes of this act" did not mean "for the purposes which this act is intended to accomplish" as petitioner urges. They meant "for the purposes of the enforcement of this act". Only by indulging in a fiction could it be said that Congress in using those words in the Federal Trade Commission Act intended that the subpoena power could be used by the Federal Trade Commission under later acts if the purposes of the later acts were sufficiently similar to the purposes of the Federal Trade Commission Act. Only by indulging in a fiction could it be said that Congress, in phrasing the Clayton Act, omitted an expression of the subpoena powers for the Federal Trade Commission because of reliance on a belief that the similarity of the purposes of the two acts empowered the Federal Trade Commission to use subpoenas in enforcement of the Clayton Act. There is no such emergency created by the omission of the subpoena power from the Clayton Act as to require courts to indulge in fictions that would result in bestowing the subpoena power upon the Federal Trade Commission in enforcing the Clayton Act against one group of corporations and withholding it from the Federal Reserve Board in

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[1] Citing **F.T.C. v. Motion Picture Ad. Co.**, 344 U.S. 392, and **Times-Picayune v. United States**, 345 U.S. 594, 609.

enforcing it against another group. The use of the subpoena power conferred upon the Federal Trade Commission by the Federal Trade Commission Act is limited to proceedings brought to enforce that act. It may not be used in proceedings brought to enforce the Clayton Act.

Petitioner makes a plea based on administrative interpretation. It is said that the Federal Trade Commission has issued in Clayton Act cases hundreds and perhaps thousands of subpoenas. That, without more, is unsufficient to supply the omission of a grant of the subpoena power in statutory law. See United States v. Morton Salt Co., 338 U.S. 632, 647.

I regret that I am unable to agree with the two cases in which the power of the Federal Trade Commission to issue subpoenas in Clayton Act cases has been upheld, F. T. C. v. Reed, D.C.N.D. Ill. E.D., Docket 56 C. 843, June 12, 1956, and F. T. C. v. Menzies, D.C.D. Md., Docket 36, August 30, 1956.

The application is denied.

Dated: New York, September 27, 1956

E. J. Dimock
United States District Judge

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APPENDIX.

1

IN THE
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

FEDERAL TRADE COMMISSION, Petitioner-Appellee, vs. WILLIAM T. REED, President REED CANDY COMPANY, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Honorable Julius J. Hoffman, Trial Jugde.

1. May 7, 1956, cause commenced.

2. Parties: Federal Trade Commission, Petitioner, v. William T. Reed, President Reed Candy Company, Defendant.

3. May 7, 1956, an Application for an Order Requiring the Production of Documentary Evidence and the Giving of Testimony was filed.

4. May 29, 1956, an Answer by William T. Reed, President, Reed Candy Company, was filed.

5. May 29, 1956, the hearing on the Application for an Order Requiring the Production of Documentary Evidence and the Giving of Testimony, was continued to June 12, 1956.

6. June 12, 1956, an Order was entered Requiring the Production of Documentary Evidence and the Giving of Testimony.

7. July 2, 1956, a Notice of Appeal from said order was filed.

2 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of June (it being the 4th day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-Six and of the Independence of the United States of America, the 180th Year.

Present:

Honorable John P. Barnes District Judge
Honorable William H. Holly, District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable William J. Campbell, District Judge
Honorable Walter J. La Buy, District Judge
Honorable J. Sam Perry, District Judge
Honorable Win G. Knoch, District Judge
Honorable Julius J. Hoffman, District Judge

Roy H. Johnson, Clerk

William W. Kipp, Sr., Marshal

Tuesday, June 12, 1956

Court met pursuant to adjournment

Present: Honorable Julius J. Hoffman, Trial Judge

On May 7, 1956, the Federal Trade Commission filed an "Application for an Order Requiring the Production of Documentary Evidence and the Giving of Testimony" in the United States District Court for the Northern District of Illinois, Eastern Division. The text of the application was as follows:

3 The Federal Trade Commission (hereinafter referred to as the Petitioner), pursuant to the authority conferred upon it by the provisions of Section 9 of the Federal Trade Commission Act (38 Stat. 722; 15 U.S.C.A. Sec. 49), respectfully applies to this Honorable Court for an order requiring William T. Reed, President, Reed Candy Company, to appear before the petitioner or an examiner now or subsequently designated by it, and produce documentary evidence and answer all questions relevant and material to and necessary and proper to the conduct of the proceeding hereinafter mentioned entitled "In the Matter of Reed Candy Company, Federal Trade Commission Docket No. 6461," and in support of such application shows as follows:

4 Paragraph One: On November 21, 1955, the petitioner issued its complaint against Reed Candy Company alleging therein that petitioner has reason to believe that said respondent in said complaint had violated the provisions of subsection (d) of Section 2 of the Clayton Act (49 Stat. 1526; 15 U.S.C.A. Sec. 13), as amended by the Robinson-Patman Act. A copy of the said complaint is attached hereto as Exhibit A and incorporated herein.

On January 30, 1956, respondent in that proceeding filed an answer to said complaint admitting certain allegations of the complaint and denying others and denying that it had violated the Clayton Act as amended by the Robinson-Patman Act. Frank Hier, a hearing examiner

of the petitioner, was designated to take testimony and receive evidence in said proceeding and to perform all other duties authorized by law in the prosecution of the said inquiry.

Paragraph Two: On February 15, 1956, the petitioner, through the said hearing examiner, issued and thereafter caused to be served upon the said William T. Reed, President, Reed Candy Company, a subpoena requiring his presence at 10:00 o'clock A.M., March 2, 1956, before the hearing examiner, in Chicago, Illinois, to testify at the instance of the petitioner and further requiring him to bring with him and produce at said time and place certain books, records, accounts, invoices and other documents of Reed Candy Company identified and described therein.

5 Thereafter on February 27, 1956, the respondent filed a motion to quash said subpoena, which motion was denied by the hearing examiner on March 2, 1956. Thereafter the respondent appealed to the petitioner from the order of the hearing examiner denying respondent's motion to quash subpoena, which appeal was denied by the petitioner on March 27, 1956.

Thereafter another subpoena, identical in all respects to the one previously issued by the examiner on February 15, 1956, was issued by the examiner on April 2, 1956 ordering William T. Reed, President, Reed Candy Company, to appear before the examiner in Chicago, Illinois on April 11, 1956 and to then and there testify and produce the documentary data therein described. A photostatic copy of said subpoena and proof of service thereof is attached hereto as Exhibit B and incorporated herein.

The place of said hearing is within the jurisdiction of this court.

Paragraph Three: On April 11, 1956, at the time and place previously designated by the hearing examiner, a hearing was duly convened and the said William T.

Reed, President, Reed Candy Company, failed to appear. Mr. David A. Canel, attorney for respondent Reed Candy Company, appeared and stated on the record that
6 William T. Reed, President, Reed Candy Company, refused to appear and testify or produce the documentary data called for by the subpoena upon the attorney's advice. Thereafter, William T. Reed, President, Reed Candy Company, failed and refused to appear and testify and failed and refused to produce any of the documentary evidence which was required by the said subpoena and has continued to so fail and refuse, although the petitioner avers, upon information and belief, that the said William T. Reed, President, Reed Candy Company was and is well able to do so.

Paragraph Four: Section 9 of the Federal Trade Commission Act provides in part as follows:

> "* * * and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiner of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.
>
> Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.
>
> Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person,

issue an order requiring such corporation or other
6a person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

And the Commission has, by its rules of practice, delegated the authority to issue subpoenas to its hearing examiners in accordance with Section 7(b) of the Administrative Procedure Act (60 Stat. 241; 5 U.S.C.A. Sec. 1006).

Wherefore: The petitioner invokes the aid of this Honorable Court, pursuant to the authority granted in Section 9 of the Federal Trade Commission Act, in requiring the production of documentary evidence by said William T. Reed, President, Reed Candy Company, in the aforementioned proceeding, and prays this Honorable Court to issue an order requiring the said William T. Reed, President, Reed Candy Company, to appear before Frank Hier, hearing examiner, or such other examiner as petitioner may designate subsequent hereto, at a time and place designated by the hearing examiner within the jurisdiction of this Honorable Court and produce the documentary evidence described in the subpoena issued by the hearing examiner of the petitioner on April 2, 1956, and heretofore served upon William T. Reed, which the said

William T. Reed, President, Reed Candy Company,
7 has heretofore failed to produce, and to answer all questions relevant and material to and necessary and proper to the conduct of the aforementioned proceeding, or show cause why he should not be so ordered.

And for such other and further relief as may be just in the premises.

* * *

8-12 * * *.

On the day the Application was filed, the Hon. Julius Hoffman, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, issued the following "Order to Show Cause":

13 Pursuant to the authority granted in Section 9 of the Federal Trade Commission Act (38 Stat. 722; 15 U.S.C.A. Sec. 49), the Federal Trade Commission having invoked the aid of this Court in requiring the production of documentary evidence and the giving of testimony by William T. Reed, President, Reed Candy Company, as a witness in a proceeding instituted by the Federal Trade Commission against Reed Candy Company, Federal Trade Commission Docket No. 6461,

and the Court having considered the application of the petitioner, it is hereby

Ordered: That notice is hereby given to William T. Reed, President, Reed Candy Company, to appear and show cause on the 29th day of May, 1956, at 10:00 A.M. why this Court shall not grant the petitioner's application and enter the attached order requiring the production of documentary evidence and the giving of testimony.

14 It Is Further Ordered, that a certified copy of this order, the petition filed herein and proposed order be served upon the defendant, William T. Reed, President, Reed Candy Company, by the United States Marshal forthwith.

Dated: May 7th 1956.

/s/ Julius J. Hoffman
United States District Judge.

On May 29, 1956, William T. Reed, President of the Reed Candy Company filed his answer. The text of the Answer was as follows:

15 The answer of William T. Reed, President of Reed Candy Company, by David A. Canel, his attorney, respectfully shows the Court:

1. For answer to the introductory paragraph of said Application, the defendant denies that the Federal Trade Commission has any authority "conferred upon it by the provisions of Section 9 of the Federal Trade Commission Act" to apply for the relief prayed in this Application which is for relief under subsection (d) of Section 2 of the Clayton Act as that Act was amended by the Robinson-Patman Act, and is not an application for relief under the Federal Trade Commission Act.

2. For answer to paragraph 1, defendant admits the allegations of Paragraph 1, but denies that there was any violation of subsection (d) of Section 2 of the Clayton Act (49 Stat. 1526; 15 U.S.C.A. Sec. 13), as amended by the Robinson-Patman Act.

3. For answer to Paragraph 2, admits the allegations of Paragraph 2, but denies that petitioner had authority to issue the said subpoena.

4. For answer to paragraph 3, the defendant admits the matters and facts therein set forth, except that defendant denies that William T. Reed was able to produce the documents called for in the subpoena.

5. For answer to paragraph 4, the defendant admits the quotation set forth in paragraph 4 is Section 9 of the Federal Trade Commission Act and admits the Commission has delegated its authority to issue subpoenas to its Hearing Examiner, but denies that said Section or any delegation of authority under said section has any application to the Clayton Act as amended by the Robinson-Patman Act, or any grant of authority to the Federal Trade Commission to issue a subpoena under the Clayton Act as amended by the Robinson-Patman Act.

Further answering said paragraph, the defendant says that the application for relief in this case is for relief under the Clayton Act as amended by the Robinson-Patman Act, and is not an application for relief under the

Federal Trade Commission Act, and that therefore the Commission has no right to the relief prayed, and no right, power or authority to issue the subpoena which was issued in this case.

Affirmative Defenses.

Further answering said complaint, the defendant respectfully shows the Court:

1. The facts and pleadings show that the Federal Trade Commission is seeking to enforce a remedy under the Federal Trade Commission Act when no proceedings have been instituted by the Federal Trade Commission against this defendant under the Federal Trade Commission Act; such action by the Commission is void, illegal, arbitrary and an illegal self discrimination that power granted under the Federal Trade Commission Act is a grant of power under the Clayton Act as amended by the Robinson-Patman Act.

17 2. The Application in this case seeks the records of Reed Candy Company, Incorporated, an Illinois corporation. Reed Candy Company, Incorporated is not a party to these proceedings. The proceedings before the Federal Trade Commission are against Reed Candy Company, Incorporated and not against William T. Reed. Reed Candy Company, Incorporated is a most essential party to these proceedings and the Application is fatally defective in that an essential party is not made a party to these proceedings.

3. The Application filed by the United States District Attorney for the Northern District of Illinois, and by the attorney for the Federal Trade Commission, does not show on its face any authority granted said attorneys from the Attorney General of the United States or any official grant of authority by the Federal Trade Commission to file said Application in this Court. Said Ap-

plication fails to show or refer to any official action by the Federal Trade Commission directing the Attorney for the Federal Trade Commission to file the Application, and fails to show that the Federal Trade Commission has requested the Attorney General of the United States to direct the United States District Attorney for the Northern District of Illinois, at Chicago, to file said Application.

4. The Federal Trade Commission has filed the Application for subpoena duces tecum in this case on account of an alleged violation by Reed Candy Company, Incorporated of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, (U.S.C.A., Title 15, Section 13 (d)). There is no charge in the original Complaint filed before the Federal Trade Commission, or in the Application for a subpoena duces tecum filed before this Court, that Reed Candy Company, Incorporated has violated, or is violating, the provisions of the Federal Trade Commission Act or any other Act administered by the Federal Trade Commission. The Federal Trade Commission only has the
18 powers granted to it under and by virtue of the Robinson-Patman Act. The Robinson-Patman Act does not grant unto the Commission the power to issue a subpoena duces tecum such as prayed in this case, and the subpoena duces tecum in this case, as shown on its face, is not issued under and by virtue of any authority, power or right given the Commission by the Robinson-Patman Act, but is issued under and by virtue of an alleged power and authority granted to the Commission by the Federal Trade Commission Act, which Act is a separate and distinct Act from the Robinson-Patman Act.

5. The Application by the Federal Trade Commission for the subpoena duces tecum it seeks in this case is filed by the said Commission pursuant to the authority conferred upon the Commission by the provisions of Section

9 of the Federal Trade Commission Act (15 U.S.C.A., Section 49). The complaint against the defendant, Reed Candy Company, Incorporated, filed by the Federal Trade Commission, is based on an alleged violation of the provisions of subsection (4) of Section 2 of the Clayton Act. The authority of the Commission to issue a subpoena duces tecum under Section 9 of the Federal Trade Commission Act, is expressly limited to the Commission's investigation under the Federal Trade Commission Act, and has on application to the Robinson-Patman Act. The action of the Commission is therefore illegal and void.

6. The Federal Trade Commission has no authority by law, no authority under Section (9) of the Federal Trade Commission Act, and has no inherent authority, to issue and enforce a subpoena duces tecum under a Clayton Act proceeding, and the Commission has no authority by law to delegate such authority to issue a subpoena duces tecum to its Hearing Examiner under a Clayton Act proceeding under the provisions of Section 7(b) of the Administrative Procedure Act, (5 U.S.C.A., Section 1006(b)) and therefore the action of the Commission in this matter is illegal and void.

19 7. The subpoena duces tecum issued in this case:

(a) Is so unreasonable, and its enforcement will deprive Reed Candy Company, Incorporated, of the protection guaranteed by the Fourth Amendment to the Constitution of the United States against unreasonable searches and seizures.

(b) Is so vague, general and indefinite, so all inclusive, that compliance with it would necessitate enormous effort by Reed Candy Company, Incorporated, resulting in great and totally unnecessary expense and the disruption of the company's executive and administrative offices, all to the serious detriment of the Company's business.

(c) Is no more than a fishing expedition into the Company's confidential and private business records and papers, relevant or irrelevant, on the possibility that these records and papers might disclose evidence of the violation of law alleged in the

(d) complaint. Compliance with the provisions of the subpoena would compel the Company publicly to disclose the names and addresses of all its customers in the area specified in the subpoena over an eighteen months period and this public information would be highly detrimental to the Company. The list of customers is a valuable property right of the Company which is entitled to protection and is privileged against disclosure. Such information is a confidential trade secret and privileged against disclosure.

(e) All of the above information is sought without even making the Company a party to this proceeding or giving the Company an opportunity to be heard. Without making the Company a party to this proceeding, this Court, for purely procedural reasons, as well as for other reasons set forth in this subparagraph, cannot grant the relief prayed.

20 8. A case similar to the instant case is now pending in the District Court of the United States for the District of Maryland. Defendant has agreed to stipulate before the hearing officer that in order to avoid multiplicity of suits and different decisions in different circuits, it would abide by the decision in the Baltimore case. Therefore, this court's decision should be stayed until there is a decision in Baltimore.

Wherefore, the defendant respectfully reqnests, for the reasons above stated and for other good and valid reasons to be made known at any hearing on the Applica-

tion for an Order, that said Application for an Order made by the Federal Trade Commission be denied.

• • •

On June 12, 1956, the Hon. Julius Hoffman, Judge of the United States District Court for the Northern District of Illinois, issued the following "Order Requiring the Production of Documentary Evidence and the Giving of Testimony":

21 Pursuant to the authority granted in Section 9 of the Federal Trade Commission Act (38 Stat. 722; 15 U.S.C.A. Sec. 49), the Federal Trade Commission having invoked the aid of this Court in requiring the production of documentary evidence and the giving of testimony by William T. Reed, President, Reed Candy Company, as a witness in a proceeding instituted by the Federal Trade Commission against Reed Candy Company, Federal Trade Commission Docket No. 6461,

and the Court having considered the application of the petitioner, it is hereby

Ordered: That the application of petitioner is granted, and that the said William T. Reed, President, Reed Candy Company, is hereby ordered to appear upon not less
22 than ten days' notice at a time and place to be set by the Federal Trade Commission or a hearing examiner thereof within the jurisdiction of this Court, and to then and there produce all the documentary evidence identified and described in a subpoena issued by the hearing examiner of the Federal Trade Commission on April 2, 1956, and already served upon said William T. Reed, President, Reed Candy Company, and then and there to answer all questions relevant and material to and necessary and proper to the conduct of the aforementioned proceeding.

Dated: June 12th, 1956

/s/ Julius J. Hoffman
United States District Judge

On July 2, 1956, William T. Reed, President of Reed Candy Company filed the following "Notice of Appeal":

23 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois

FEDERAL TRADE COMMISSION,
Petitioner,
vs.
WILLIAM T. REED, President,
Reed Candy Company,
Defendant.
Civil Appeal
No. 56 C 843

NOTICE OF APPEAL
(Filed July 2, 1956)

Notice is hereby given that William T. Reed, President, Reed Candy Company, defendant in the above named action, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on June 12, 1956.

Dated: July 2nd, 1956.

/s/ David A. Canel
Attorney for Defendant-Appellant
10 South LaSalle Street,
Chicago, Illinois
FRanklin 2-7900

24 United States of America)
Northern District of Illinois) ss.

• • (Caption—No. 56 C 843) • •

CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on the 2nd day of July, 1956, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Wm. A. Sommers
Room 1310, 226 West Jackson Blvd.
Chicago 4, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 2nd day of July, 1956.

Roy H. Johnson, Clerk
By Gizella Butcher,
Deputy Clerk

(Seal)

25 • • •

26

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois

* * * (Caption—No. 56 C 843) * * *

United States of America)
Northern District of Illinois) ss.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify and transmit to the United States Court of Appeals for the Seventh Circuit as the Rerocrd on Appeal in the above-entitled cause the following original papers from the file for said cause in my office:

Petition, Order to Show Cause, Answer, Order for Production of Documents, Etc., Notice of Appeal, Designation of Record on Appeal.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois this 9th day of August, A. D. 1956.

Roy H. Johnson, Clerk

(Seal)